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E. ROBERT SEAVER, CLE

No. 1[illegible] 89

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOOD GIRL'S HIGH SCHOOL, UKRANIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee.

APPEAL FROM A DISTRICT COURT OF THREE JUDGES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, INC., AMICUS CURIAE

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BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, INC., AMICUS CURIAE

Interest of the Amicus

This brief is submitted with the consent of counsel for the parties, on behalf of the National Association of Independent Schools, Inc. ("the Association"), a Massachusetts corporation.

The Association's membership comprises approximately 768 independent schools engaged in primary and secondary education in 43 states of the United States, including 56 schools in the Commonwealth of Pennsylvania. Its membership also includes 27 regional school associations (one of which is the Pennsylvania Association of Independent Schools, Intervenor Defendant-Appellee) and 16 other associations of teachers, alumni and scholarship groups connected with independent schools.

The stated purposes of the Association are

> "to assist and strengthen independent schools in the United States . . . to aid them to serve effectively the free society from which they derive their independence." National Association of Independent Schools, Inc., By-Laws, Art. II.

Members of the Association include schools which in general terms may be categorized as either (a) having no direct relationship of any kind with a religious group, some of these including in their programs, however, some religious observance varying in nature and degree from school to school; (b) affiliated with but not supported or controlled by a religious group; or (c) supported or controlled in varying degrees by a religious group. Schools in the latter two categories would be in the minority.

The Association files this brief because it believes that state aid in the form provided under the Pennsylvania statute before the Court is permitted by the Constitution, and is vital to the ability of independent schools to make their full contribution to the public welfare of American society.

Statement of the Case

Individual citizens and taxpayers of, and associations of persons residing in, the Commonwealth of Pennsylvania challenged the constitutionality of the Pennsylvania

Nonpublic Elementary and Secondary Education Act of June 19, 1968 (the "Education Act"); 24 Purdon's Statutes §5601-09 (Supp. 1970), (hereafter cited as "P.S."). Enacted by the Pennsylvania General Assembly, the Education Act empowers the Commonwealth to contract for the purchase of "secular education service" to be furnished by and in non-public schools in Pennsylvania which meet the compulsory school attendance requirements of State law.

The General Assembly's reasons for enacting the Education Act are stated in Section 2 thereof and include the following:

> "It is hereby determined and declared as a matter of legislative finding . . .
>
> "(3) That the elementary and secondary education of children is today recognized as a public welfare purpose; that nonpublic education, through providing instruction in secular subjects, makes an important contribution to the achieving of such public welfare purpose; that the governmental duty to support the achieving of public welfare purposes in education may be in part fulfilled through government's support of those purely secular educational objectives achieved through nonpublic education . . ." 24 P.S. § 5602.

The Education Act provides, in essential part, for the creation of a fund dedicated to "purchasing secular educational service consisting of courses solely in the following subjects: mathematics, modern foreign languages, physical science and physical education . . ." 24 P.S. § 5604. The Education Act further provides that courses in these subjects shall not "include any subject matter expressing religious teaching, or the morals or forms of worship of any sect." 24 P.S. § 5603(3).

The defendants are State officials responsible for administration of the Education Act, and certain schools with which the Commonwealth has contracted for the purchase of secular educational services under the Education Act.

The appellants herein brought suit in the United States District Court for the Eastern District of Pennsylvania, basing jurisdiction on the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, 28 U.S.C. § 1343. The defendants moved to dismiss the complaint on a number of grounds. The three-judge Court dismissed the complaint, and included in its opinion a determination that the Education Act was constitutional. 310 F. Supp. 35 (E.D. Pa. 1969).

Scope of this Brief

This brief is directed solely to the question of the constitutionality of the Act under the First Amendment to the Constitution of the United States, to the extent the First Amendment is made applicable to the States by the Fourteenth Amendment. The pertinent parts of these amendments are as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U. S. Const. Amend. I.
>
> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ." *Id.* Amend. XIV, § 1.

Summary of Argument

The decision of the United States District Court for the Eastern District of Pennsylvania should be affirmed. The Education Act meets the applicable tests established by this Court for determining the validity of laws providing

for aid to nonpublic schools; this is particularly so where, as here, State action is involved with the result that the Establishment Clause must be considered in the light of the applicable provisions of the Fourteenth Amendment, which relates only to a deprivation of liberty.

I

The Pennsylvania statute meets the tests for constitutionality under the Establishment Clause.

A variety of tests under which the constitutionality of the Education Act should be determined have been set forth in opinions of the present Justices of this Court who wrote in *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *Abington School District* v. *Schempp*, 374 U. S. 203 (1963); *Board of Education* v. *Allen*, 392 U. S. 236 (1968); and *Walz* v. *Tax Commission*, 397 U. S. 664 (1970). These tests are here considered as expressed by the individual Justices of the Court. They establish with unanimity that the Pennsylvania statute violates neither the First nor Fourteenth Amendment.

The Chief Justice

Considering the validity under the Establishment Clause of a grant of tax exemption for the property of churches and certain other nonprofit organizations, the Chief Justice, speaking for the Court in *Walz*, states the intendment of the Clause as follows:

> "It is sufficient to note that for the men who wrote the Religious Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U. S. at 668.

The question is whether the Education Act in its effect can be deemed to constitute:

> "sponsorship, financial support and active involvement of the [State] in religious activity."

Clearly there is no sponsorship. The benefits of the Education Act are provided for all independent schools without regard to religious affiliation, so that the focus implicit in sponsorship is lacking. Furthermore, the Education Act's preclusion of any religious teaching negates the remotest trace of sponsorship. For the same reasons there is no financial support of "religious activity". There is of course support of secular teaching, just as there was in providing secular books, as in *Allen*, or as there would be in the State's furnishing televised instruction for use by all schools in the State. But none of these constitute financial support of "religious activity", nor can they be deemed to produce involvement of the State in such activity.

With the meaning of "establishment" in mind, the Chief Justice's statement in *Walz* of First Amendment requirements can be applied:

> "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion." *Id.* at 669.

There being no establishment, is there the prohibited interference? Certainly not in the Education Act. Participation under the Education Act is voluntary. No school is required to participate. No school has charged the State with interference, either in this or any other known proceeding.

The Chief Justice's opinion in *Walz* expressly affirms the type of secular support referred to above. It holds that

although the tax exemption there considered was undoubtedly beneficial to a church, the mere fact that a statute has as one of its effects the provision of "aid" to a religious organization will not invalidate the statute any more than it did in *Allen*, where:

> "making textbooks available to pupils in parochial schools in common with public schools was surely an 'aid' to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books." *Id.* at 671-72.

Thus, although teaching services contracted for under the Act constitute a form of aid to secular activities of a religious institution, the Court has eliminated this as a determinative factor on the issue of constitutionality.

The *Walz* opinion next considers whether the legislative purpose in granting tax exemption is either advancement or inhibition of religion—whether it can be regarded as sponsorship or hostility. The conclusion is that the purpose of tax exemption is none of these because the State:

> "has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical and patriotic groups." *Id.* at 673.

The statute now before the Court meets this test. The legislature has not singled out "one particular church or religious group or even churches as such". And it has granted the right to contractual teaching arrangements to all schools within a broad class. As in the case of the class benefited by the New York tax exemption, it may equally be said as the Chief Justice said in *Walz:*

> "The State has an affirmative policy that considers these groups [in the present case non-public schools] as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest." *Id.* at 673.

The Court refuses to base its conclusion of constitutionality on the existence of social welfare services which are usually a concomitant of a church's function, this because the extent of social services rendered is so variable an aspect of the work of religious bodies as to make governmental evaluation a form of entanglement between government and the church which is to be avoided:

> "We must also be sure that the end result—the effect—is not an excessive government entanglement with religion." *Id.* at 674.

Obviously the entanglement which would result from an attempted evaluation of "social services" which are susceptible of no known standards of measurement are very different from the necessary and established relationships between state education departments and those schools maintained by religious and nonreligious groups. Each of the beneficiary schools is a member of a class which, before the present legislation was enacted, had a necessary and continuing relationship with the State. This grew out of the fact that educational standards are the concern of the State and any school purporting to provide an education must comply with State criteria, just as a building, whether owned by a religious or nonreligious body, must comply with building law requirements. As stated by Justice White in *Allen*:

> "Since *Pierce* [*Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925)], a substantial body of case law has confirmed the power of the States to insist that attend-

ance at private schools, if it is to satisfy State compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction." 392 U. S. at 245-46.

The Pennsylvania Public School Code of 1949, 24 P.S. §§ 1-101 to 27-2702 (1962), contains numerous specifications of the type referred to by Justice White:

§ 15-1511. Subjects of instruction; flag code

"In every elementary public and private school, established and maintained in this Commonwealth, the following subjects shall be taught, in the English language and from English texts: English, including spelling, reading, and writing, arithmetic, geography, the history of the United States and of Pennsylvania, civics, including loyalty to the State and National Government, safety education, and the humane treatment of birds and animals, health, including physical education, and physiology, music, and art."

§ 16-1605. Courses of Study

"(a) In all public, private or parochial schools, there shall be integrated in the social studies curriculum courses of study as provided in this act. . . . During grades seven through twelve inclusive, there shall be included at least four semesters or equivalent study in the history and government of that portion of America which has become the United States of America, and of the Commonwealth of Pennsylvania, of such nature, kind or quality, as to have for its purpose the developing, teaching and presentation of the principles and ideals of the American republican representative form of government . . ."

It is further provided in § 16-605(a) that the study of the history of the United States:

> "shall also be such as will emphasize the good, worthwhile and best features and points of the social, economic and cultural development, the growth of the American family life, high standard of living of the United States citizen, the privileges enjoyed by such citizens, their heritage and its derivations of and in our principles of government."

Thus the Education Act before this Court brings about no change in the relationship between the State and the schools, nor any real increase in the elements of the existing necessary State supervision. The fields of study in which the contractual services can be furnished are, as pointed out, in themselves limited to those where any realistic concern of involvement with religious instruction is *de minimis*. Mathematics, physical education, physical sciences and modern languages cannot seriously be regarded as vehicles for any likely introduction of religious dogma. Accordingly the State's entanglement, if such it can be called, is one already in existence and involves only secular teaching standards which the State will simply continue to apply in determining the schools' qualification *qua* schools.

Mr. Justice Brennan

Mr. Justice Brennan's concurring opinion in *Walz* adds other pertinent and basically similar tests to those expressed for the Court. Referring to his opinion in *Schempp*, he points to criteria which the Court "has consistently sought to mark in its decisions expounding" the First Amendment. The Constitution forbids:

> "'those involvements of religious with secular institutions which (a) serve the essentially religious

> activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice.'" 397 U. S. at 680, quoting *Schempp*, 374 U. S. at 294-95 (concurring opinion).

The emphasis is on what is "essentially" religious, not merely religious. It must be an "essentially" religious activity or purpose or means before it constitutes an excessive involvement. Clearly no one of these criteria is violated by the Education Act. The "essentially" religious activities of the schools are not served; nor are the organs of government used for "essentially" religious purposes; the Education Act precludes such involvement both by limiting the areas of study in which contracted services will be furnished, and by forbidding the teaching of "any subject matter expressing religious teaching or the morals or forms of worship of any sect." And for the same reason, the Education Act cannot be said to use "essentially religious means to serve governmental ends, where secular means would suffice". The Education Act provides secular, not religious means, and only if one were to assume violation by a school of the express strictures of the Education Act, followed by improper claims for payment thereunder, would there be any religious involvement. There is no basis for any assumption of such wrongdoing on the part of the Schools. As the Court said in *Allen*: "Absent evidence, we cannot assume that school authorities . . . will not honestly discharge their duties under the law." 392 U. S. at 245.

Furthermore, Mr. Justice Brennan points out in *Walz* that there are two basic secular purposes which provide social justification for tax exemption of religious organizations; first, such organizations "contribute to the well being of the community in a variety of nonreligious ways", 397

U. S. at 687, and secondly, they "uniquely contribute to the pluralism of American society by their religious activities." *Id.* at 689. These secular benefits are even more pronounced in the case of the church school, and under the restrictions imposed by the Education Act, the religious concomitant is minimized, if not eliminated. In other words, where, as under the Education Act, the aid is restricted to the secular teaching function of the institution, it becomes an *a fortiori* case as compared with a tax exemption which of necessity directly benefits both the secular and religious activities of the institution.

Mr. Justice Brennan shares the Court's concern as to the degree of State involvement with religion which a statute entails, but as pointed out above, there is no involvement under the Education Act over and above that previously existing and applicable alike to nonreligious and religious schools.

Mr. Justice Harlan

Mr. Justice Harlan's tests, as expressed in his concurring opinion in *Walz,* emphasize the two requirements of "neutrality" and "voluntarism", meaning that the government must not "favor religion over nonreligion, nor sponsor a particular sect, nor encourage participation or abnegation of religion." 397 U. S. at 694. The Education Act does not favor religion over nonreligion—all independent schools qualify for aid, whether religious or not, and when religious, irrespective of the particular religion. Nor is the Education Act responsible for any increase in the necessary State-school relationship which, as stated above, is inherent in the position of any school which must meet State educational requirements.

The same precepts are found somewhat differently expressed in Mr. Justice Harlan's concurring opinion in *Allen*, where he said:

> "I would hold that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State 'so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom,' [citing *Schempp*, 374 U. S. at 307] it is not forbidden by the religious clauses of the First Amendment." 392 U. S. at 249.

Not only is the Education Act expressly and carefully "calculated to achieve nonreligious purposes", it also clearly does not entail State involvement which could give rise "to divisive influences and inhibitions of freedom". Schools are free to contract or not contract under the Education Act, and if they contract, they know precisely the terms on which their contract, meaning their secular commitment, is to be fulfilled. Finally, the Education Act meets the Justice's further criterion expressed in *Allen*, by not employing religion "as its standard for action or inaction." *Id.* at 250. The Education Act is not concerned with religion; it is only concerned with secular teaching.

Mr. Justice White

The particular tests heretofore relied upon by Mr. Justice White in his opinion in *Allen*, particularly as supplemented by his concurrence in *Walz*, are also tests which the Pennsylvania statute can readily meet.

Basic to Mr. Justice White's opinion in *Allen* is the *Schempp* test ("a secular legislative purpose and a primary effect that neither advances nor inhibits religion," 374

U. S. at 222), a test which the Education Act meets as fully as did the statute in *Allen*. The General Assembly has declared a factually convincing secular purpose, and the primary effect of neither advancing nor inhibiting is guaranteed by the Education Act's purposefully restrictive provisions. And although Mr. Justice White's opinion in *Allen* points to the fact that under the technical provisions of the New York book-furnishing statute, "no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools", 392 U. S. at 243-44, he recognizes that free books "make it more likely that some children choose to attend a sectarian school, thus helping the school as in the case of bus transportation." *Id.* at 244. This concession, plus Mr. Justice White's concurrence in *Walz* where the exemption is clearly a direct benefit to the institution, would indicate that in his view and the Court's, exclusively "child benefit" (rather than institution benefit) is not by any means a requisite for constitutionality. In fact, Mr. Justice White in *Allen* appears to have relied most heavily on the undoubted social benefits referred to by Justices Brennan and Harlan in their decision in *Walz*. He states as clearly basic to his decision in *Allen*:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. *Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed*

> *opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.*" 392 U. S. at 247-8 (emphasis added).

It is the support of this secular function alone to which the Education Act is scrupulously limited.

Mr. Justice Stewart

Mr. Justice Stewart, joining with the majority in both *Allen* and *Walz*, reaffirms the following test expressed in his dissent in *Schempp*, where he pointed out:

> "But insofar as the *McCollum* decision rests on the Establishment rather than the Free Exercise Clause, it is clear that its effect is limited to religious instruction—to government support of proselytizing activities of religious sects by throwing the weight of secular authority behind the dissemination of religious tenets." 374 U. S. at 314.

Neither the furnishing of books, nor the exemption from tax of a broad category of eleemosynary and religious institutions, could be deemed a "support of proselytizing." Nor is such support found in the teacher funding of the strictly secular courses provided for under the Education Act, particularly as the benefits under the Education Act are provided for the broad category of religiously and nonreligiously oriented schools.

Mr. Justice Black

Mr. Justice Black, through joining in the Court's opinion in *Walz*, establishes that his interpretation of the Establishment Clause fits within the framework agreed to in

Walz by all but one member of the Court. And we have pointed out that the basic tenets of the Court as stated by the Chief Justice in *Walz* do affirmatively sustain the Act. Mr. Justice Black's dissent in *Allen* would not be contrary to a finding that the Education Act is constitutional. For the Education Act provides substantially greater assurance against religious involvement than did the New York book-furnishing statute. The books were free to be used in conjunction with or as aids to teaching in areas which are expressly forbidden under the Education Act. The assurance of a clear separation of the secular from the sectarian is thus found to a far greater degree under the Education Act.

Furthermore, Mr. Justice Black's opposition expressed in his *Allen* dissent to paying "the salaries of the religious school teachers", 392 U. S. at 253, though not there in issue, cannot be deemed to foreclose payment for the kind of teaching which, as under the Education Act, is so contractually restricted as effectively to eliminate any religious issue whatsoever. The teaching provided for under the Education Act, with its express prohibition of any religious teaching, is the equivalent of what would be obtained if teachers, having no connection with any religion, were contracted for and sent into the school to teach exclusively secular subjects. Inherent therein is no more "establishment" than the payment of the bus driver in *Everson.*

Mr. Justice Douglas

Mr. Justice Douglas took his stand with the majority in *Everson;* he then distinguished *Everson* in his dissent in *Walz* ("This case is quite different. Education is not involved." 397 U. S. at 704); and he added that he had "grave doubts" about his position with the majority in

Everson because he is "convinced that grants to institutions teaching a sectarian creed violate the Establishment Clause." *Id.* at 703. But it is a very different thing, on the one hand, to provide tax exemption and busing, both of which of necessity sustain equally the religious functions as well as the secular; and on the other hand, to provide purely secular services. Under the Education Act, the service which is called for is not dissimilar to State furnished school instruction by television, i.e., an input of purely secular education. It is not in any usual sense "a grant" to an institution teaching a sectarian creed. The institution cannot use the funds for any sectarian purpose. Would furnishing of secular TV instruction to a religious school be a "grant"? Clearly not; and no more is the specified secular output of a teacher *in praesenti.*

Thus the restriction which Mr. Justice Douglas finds in the Establishment Clause as applied to the laws considered in *Everson* and *Walz* provide no bar to constitutionality of the Education Act.

* * * * *

From the foregoing review of opinions in the most pertinent cases, it appears impossible to find any one statement which will suffice to distinguish the permissible from the unpermissible under the Establishment Clause. It is this fact which provides the reason for testing the present law with as many different tests as can be found in the recent cases which have so fully elicited the views of this Court. The Education Act appears to meet the most stringent requirements of any of these tests. Accordingly the decision of the lower court should be affirmed.

II

The Establishment Clause is not applicable to the States where, as here, there is no interference with religious liberty.

The First Amendment applies to the States only to the extent that it has been made applicable by the Fourteenth. But the latter can be operative only to the extent that State action either denies equal protection (which, for the reasons found by the Court below, is not the case here) or is found to "deprive any person of life, liberty or property without due process of law". A denial of the free exercise of religion would be a deprivation of liberty; consequently to regard the Fourteenth Amendment as incorporating the Free Exercise clause of the First, is entirely consistent with the terms of the Fourteenth. But unless the plain language of the Fourteenth is to be disregarded, there is nothing in the Fourteenth which provides any basis for incorporating the Establishment Clause except where establishment can be found to involve some appreciable deprivation of religious liberty.

The earlier opinions of this Court regarding the incorporation of the First Amendment by the Fourteenth did not advert to this important distinction between the two Religious Clauses. The first of these opinions was in *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), where the Court declared both the Religious Clauses to be applicable. But the actual issue was clearly one of free exercise—public criticism of the Roman Catholic Church and solicitation of funds—rather than establishment; and the Court spoke of *both* clauses in terms of religious freedom: "Thus the Amendment embraces two concepts—freedom to believe and freedom to act." *Id.* at 303.

It was not until *Everson* that the Court expressly considered the constitutionality of State legislation on establishment grounds, but the opinion there gave no explanation of the basis for incorporation of the Establishment Clause by the Fourteenth Amendment. It merely indicated that both Religious Clauses were applied to the States by the Fourteenth Amendment, and cited in support of this proposition *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943), which was concerned solely with free exercise—the peddling of religious literature.

Since *Everson,* the Court has on several occasions declared that the Establishment Clause was applied to the States by the Fourteenth Amendment, *e.g. Engel* v. *Vitale,* 370 U. S. 421 (1962); *McCollum* v. *Board of Education,* 333 U. S. 203 (1948). But in only one case has an opinion discussed the basis on which the "liberty" protected by the Fourteenth Amendment embraces freedom from establishment. This was the concurring opinion of Mr. Justice Brennan in *Schempp:*

> "It has also been suggested that the 'liberty' guaranteed by the Fourteenth Amendment logically cannot absorb the Establishment Clause because that clause is not one of the provisions of the Bill of Rights which in terms protects a 'freedom' of the individual . . . The fallacy in this contention, I think, is that it underestimates the role of the Establishment Clause as a co-guarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone. The Free Exercise Clause 'was not to be the full extent of the Amendment's guarantee of freedom from governmental intrusion in matters of faith.'" 374 U. S. at 256, quoting *McGowen* v. *Maryland,* 366 U. S. 420, 464 (1961).

This opinion clearly recognized, as is indeed inescapable from the wording of the Fourteenth Amendment, that—whatever may be the limits on Federal establishment—State establishment is outlawed only to the extent that it deprives any person of religious liberty. And the cases in which the Court has invalidated State laws on establishment grounds have all involved such a deprivation. In *McCollum* v. *Board of Education, supra,* there was a strong element of State pressure in favor of religious teaching in the public schools: "Pupils compelled by law to go to school for secular education are released in part from their legal duty upon condition that they attend religious classes." 333 U. S. at 209. In *Engel* v. *Vitale, supra,* the prayer officially prescribed for use in public schools obviously had the effect of governmental pressure in favor of religion, though direct coercion was obviated by excusing individual pupils from participation: "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure . . . to conform . . . is plain." 370 U. S. at 431. In *Schempp,* Bible reading in the public schools clearly had a similar effect.

But in the present case there is no trace of governmental pressure in favor of any religion or of religion in general. The only element of compulsion involves collection of taxes, and the proceeds are used in a completely neutral and nondiscriminatory manner to aid secular education regardless of whether it takes place in religious or nonreligious schools. The Court cannot strike the Education Act down without holding for the first time that the Establishment Clause, as applied to the States by the Fourteenth Amendment, precludes state aid involving no deprivation of religious liberty. To so hold would, we submit, be inconsistent with the plain wording and purpose of that Amendment.

It may be that the line of reasoning suggested above would lead to the conclusion that the States are freer to aid religious institutions in ways that are forbidden to the Federal Government. As Mr. Justice Harlan observed, concurring in *Walz*:

> "It may also be that the States, while bound to observe strict neutrality, should be freer to experiment with involvement—on a neutral basis—than the Federal Government." 397 U. S. at 699.

This need not be decided now. The important point is that so long as there is no restraint on complete religious liberty, the Constitution should not be interpreted to restrict the freedom of the several States from working out the new relationships between public and independent school education required by changing economic, social and educational conditions. The importance of allowing State experimentation within the framework of the First and Fourteenth Amendment is as great now as when it was eloquently described by Mr. Justice Brandeis during another critical period in our history:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise

> of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932), dissenting opinion (footnote omitted).

Since this warning was sounded, the Court has disclaimed the power it then asserted to apply to State law a substantive test of due process. But it now asserts, as it did not then, the power to apply a substantive test of establishment. This power we do not question, but we urge that it too must be applied with caution when invoked to "stay experimentation in things social and economic". Only a genuine threat to religious liberty can justify the striking down of a State's attempt in good faith to meet an economic crisis in education by availing itself of the facilities of all schools—public and private, religious and nonreligious—to serve the public interest.

III

Other issues raised by Appellants.

This brief has not dealt with numerous other issues raised by Appellants. With respect to them, reliance is placed on the unanimity with which they were disposed of below, and the grounds for affirmance stated in the brief of the Pennsylvania Association of Independent Schools, to which this Association subscribes.

There is, however, in Appellants' brief, such distortion of fact, particularly with respect to two aspects of the position of independent schools, as to call for correction here.

Appellants represent that the Pennsylvania independent schools, other than the parochial schools, comprise "a white school system," (Appellants' Br. at 49), and "obviously do not need aid," (*Id.* at 34). The facts are exactly contrary.

One of the primary reasons why independent schools require aid is because of their determination to serve a broader segment of society and the large amount of scholarship aid which this entails.

Most of the schools comprising the Pennsylvania Association of Independent Schools are members of the National Association. The Board of Directors of the latter Association adopted a statement of policy on June 17, 1968 which results in denying the services and privileges of the National Association, to any school designed to provide segregated education. The statement included the following:

"Statement of the NAIS Board of Directors on Open Enrollment Policy

"1. The Board of Directors of NAIS stands firmly behind the principle that in the member schools of the Association the admission of students, as well as the employment of school personnel, should be open to all who are qualified regardless of race or color, and it believes that this principle is both firmly grounded in the spirit of American democracy and in keeping with the public responsibilities of the independent school.

"2. The Board is aware of the establishment in recent years of schools whose purposes and policies are designed to provide segregated education; it believes that such schools are contrary to the best interests of American society and, therefore, of the independent school, and it will not extend to such schools the services or privileges of the Association.

"3. The Board urges in the strongest possible terms that all member schools of the Association adopt or reaffirm admissions policies and practices which are in keeping with the principles of open enrollment. The NAIS Board and staff offer whatever services they may render to this end."

The National Association's Minority Group Survey for the 1969-70 school year shows, among other things, the following:

(i) Within the Association's membership, an increase in black enrollment from 3,720 to 7,617 or 105% over what it was three years before.

(ii) A black and other minority group enrollment of 3.5% of total enrollment of all member schools.

(iii) Receipt of financial aid by one out of two minority group students, compared to one out of ten in the total school population of members.

(iv) Increase in black faculty members from 149 in 1966-67 to 244 in 1969-70 (a 63% increase).

Obviously the foregoing is utterly inconsistent with Appellants' attempt to picture independent schools as a "white" system. Integration presents a difficult problem in every area of our society. It is heightened in the case of the independent school because such schools must depend primarily on tuition payments for their existence, and minority groups are only beginning to have the place in society which permits them to have the means. But the purpose of independent schools, including those in Pennsylvania, is to have open enrollment and an integrated enrollment within the limits of their financial capacity.

Wholly aside from the added economic burden which integration places on independent schools, the economic facts of today are such as to threaten their continuance if public support is not forthcoming. Only a minute fraction of independent schools have sufficient endowment to provide income of any significance; independent schools find it increasingly difficult to compete with public school teacher salaries; and it is the Association's view that parents who contribute through taxation to the support of public schools

on the level of support which those schools now receive cannot realistically be expected to meet further increases in tuition charges of independent schools. It is this combination of circumstances which makes public support for the independent school not only justified but requisite for the fulfillment of the role which the independent school should and can play in our society. A state legislature would therefore certainly be economically justified in providing non-public schools with aid in an amount equal to the cost of educating the same child in a public school. It would, in fact, be wholly justified in providing more, if it thought the benefit to education as a whole, whether for experimental reasons, for standard setting, or for other reasons, justified larger support.

The demeaning reasons ascribed by Appellants to the considered action of the Pennsylvania legislature (Appellants' Br. at 34,) are therefore wholly without justification, and appear to have been inserted solely in an effort to prejudice this Court against non-public schools in the hope that this would sway the Court in its decision of the controlling constitutional issues which have been considered above.

CONCLUSION

As a measure to aid secular education, expressly excluding religious teaching, the Education Act does not offend the Establishment Clause under the various tests to be found in the prior opinions of the Court and those of its concurring and dissenting members.

Since the Education Act involves no deprivation of religious liberty, it cannot violate the First Amendment as applied to the States by the Fourteenth.

The decision of the District Court should be affirmed.

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